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IN THE

Supreme Court of the United States

No. 79-1685

ROBERT BREITNER and LUELLA BREITNER,
Petitioners,

– *v* –

RICHARD HARRIS, d/b/a RICHARD HARRIS BUILDERS,
Respondent.

BRIEF CONTRA PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HAROLD C. MOAN
JAMES E. BRAZEAU
Moan and Raker
219 Bell Building
Toledo, Ohio 43624
(419) 241-5263
Attorneys for Respondent

TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 2

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Cuppy v. The Lathrop Co.
C.A. No. L-75-170, Lucas County, Ohio,
Court of Appeals 2

Dick v. New York Life Ins. Co.
359 U.S. 437 4

Gibson v. Phillips Petroleum Co.
352 U.S. 874 2

Gowdy v. United States
412 F. 2d 525 (1969) 2

Manaia v. Potomac Electric Power Co.
268 Fed. 2d 793 (Fourth Circuit, 1959), cert. den.
361 U.S. 913, 80 S. Ct. 255, 4 L. Ed. 2d 183 5

Neely v. Martin K. Eby Construction Co., Inc.
386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75,
Rehearing Den., 386 U.S. 1027, 86 S. Ct. 1366,
18 L. Ed. 2d 471 (1961) 6

Newell v. Norton
3 Wall. 257 4

Wilkerson v. McCarthy
336 U.S. 53 3

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OCTOBER TERM, 1980

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States

STATEMENT OF THE CASE

The petitioners' statement of the case omits the fact that at the conclusion of the plaintiffs' case — in chief, defendant Harris also made a motion for a directed verdict which was summarily overruled, giving counsel no opportunity to argue the law applicable. The same can be said for the Harris' motion for a directed verdict at the conclusion of all of the evidence. This fact is of considerable significance when one reads in the District Court's opinion and order that "It is ashamed that it accepted without analysis the contentions of the plaintiffs, and thus caused the trouble and expense of two jury trials of this case, when the matter should have been resolved, at the latest, at the close of the plaintiffs' case — in chief, at the first trial." Had argument been permitted on the part of Harris' counsel; had the Trial Judge been made aware of *Gowdy v. United States,* 412 F. 2d 525 (1969), as well as the many Ohio State decisions referred to in *Cuppy v. The Lathrop Co.,* C. A. No. L-75-170, Lucas County Court of Appeals, a defendant's verdict should have been granted. I believe no one can reasonably argue that the granting of a directed verdict in a jury case deprives either party of its constitutional rights under the Seventh Amendment.

REASONS FOR DENYING THE WRIT

The United States Supreme Court has long since announced that it is not the proper forum for a review of the evidence in either of the lower courts because of any imagined or claimed right under the Seventh Amendment of the Constitution. As early as 1956 in *Gibson v. Phillips Petroleum Co.,* 352 U.S. 874, Justices Frankfurter and Harlan joined in a dissent which we believe has been adopted by the United States Supreme Court. *Gibson* was an ordinary suit for damages for injuries claimed to have been caused by the defendant's fault and the question of liability turned upon Texas law. The Justices made this comment:

"These diversity litigations place, it is becoming increas-

ingly recognized, an undue burden upon the federal courts in their ability to dispose expeditiously of other litigation which can be properly brought only in the federal courts. Very often litigants in the position of the plaintiff bring a suit involving merely local law in a federal court because for one reason or another they expect a more favorable outcome than if the suit were tried in the local courts.''

* * *

''In taking one of these cases, encouragement doubtless is given to seek this Court's review in other like cases. But Congress sought to relieve this Court of the burden of such cases when it established the Courts of Appeals in 1891. This Court has respected the purpose of that enactment by stating again and again that it does not sit to correct errors, even a plain error, in a particular case, especially one involving a local controversy of this sort. The Supreme Court of the United States is designed for important questions of general significance in the construction of federal law and in the adjustment of the serious controversies that arise inevitably and in increasing measure in a federal system like ours. These questions are more than sufficient in volume and difficulty to engage all the energy and thought possessed by the Court; it should not be diverted by the correction of errors in local controversies turning on particular circumstances.

The Court's consideration of a case like this and the encouragement given for similar demands upon the Court are, in my deep conviction, so inimical to the effective discharge of the true functions of this Court that I cannot abstain from expressing my dissent from the Court's entertainment of the petition for certiorari.''

In *Wilkerson v. McCarthy,* 336 U.S. 53, Justice Frankfurter had this to say in a concurring opinion (65):

''Only an incompetent or a willful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree as to whether proof in a case is sufficient to demand submission to the jury. The fact that a third court thinks

there was enough to leave the case to the jury does not indicate that the other two courts were unmindful of the jury's function. The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge."

In *Dick v. New York Life Ins. Co.*, 359 U.S. 452, Justice Frankfurter had this to say:

"No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal."

At Page 437 of *Dick,* Mr. Chief Justice Taft is quoted thus:

"The appeal to us should not be based on the right of a litigant to have a second appeal."

* * *

"The sound theory of that Act (Act of 1891) and of the new Act is that litigants have their rights sufficiently protected by a hearing or trial in the courts of first instance, and by one review in an intermediate appellate Federal court. The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court."

Again, Justice Frankfurter quotes Mr. Justice Grier in *Newell v. Norton,* 3 Wall. 257, as follows:

"It would be a very tedious as well as a very unprofitable task to again examine and compare the conflicting statements of the witnesses in this volume of depositions. And,

> even if we could make our opinion intelligible, the case could never be a precedent for any other case, or worth the trouble of understanding.
>
> * * *
>
> Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony."

The case law is unquestionably clear that the granting of a motion for judgment notwithstanding the verdict is constitutional and does not constitute a denial of a party's right to a jury trial under the Seventh Amendment. The decisions of the lower courts and the implication that can be drawn from the decisions of the United States Supreme Court would indicate that the motion for judgment notwithstanding the verdict is a proper exercise of power by the Court when the jury returns a verdict at substantial variance with the evidence. The opinion of the Court in *Manaia v. Potomac Electric Power Co.*, 268 Fed. 2d 793 (Fourth Circuit, 1959), cert. den. 361 U.S. 913, 80 S. Ct. 255, 4 L. Ed. 2d 183, is illustrative of the many decisions approving the use of motions for judgments notwithstanding the verdict. In this regard, the Court stated:

> "Finally, it is said that granting these judgments n. o. v. was a denial of the plaintiffs' rights under the Seventh Amendment. It is apparent from their brief, however, that the learned counsel for the plaintiffs have no deluding impression that this contention adds anything of substance to their position. They seem to recognize that no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitu-

> tional principle into the familiar process of appraisal of evidence and its associated inferences.
>
> Were a court indifferent to the established basis upon which powers have been allocated between the court and jury or beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred. The District Court, here, however, was conscious of the limitations of its power, and conscientious and objective in its exercise. Citing *Burcham v. J. P. Stevens & Co.*, 4 Cir., 209 F. 2d 35, he approached the problem 'in the light of the admonition of the Court of Appeals of this Circuit as to the limited authority of trial judges to disturb jury verdicts,' as do we. (163 F. Suppl. 672.) Even the plaintiffs describe his approach as 'fair-minded'. The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this. See the opinion of Mr. Justice Frankfurter in *Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935; Smith v. Reinauer Oil Transport, Inc., 1 Cir., 256 F. 2d 646.*"

As already indicated, the Supreme Court has not directly decided this issue, but their decision in *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75, Rehearing Den., 386 U.S. 1027, 86 S. Ct. 1366, 18 L. Ed. 2d 471 (1961) is certainly a very strong indication of the Court's position concerning the constitutionality of motions for judgments n. o. v. In that case, defendant moved for a directed verdict at the close of the plaintiff's case as well as at the close of all the evidence. The Trial Court denied the motions and submitted the case to the jury which returned a verdict for plaintiff. Subsequently, defendant moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial which were denied by the Trial Court. Defendant appealed claiming that the denial of the motion for judgment n. o. v. was error and the Court of Appeals for the Tenth Circuit concurred and directed the Trial Court to dismiss the action. Thereafter, plaintiff was granted a writ of certiorari by the United States

Supreme Court to determine whether the Court of Appeals had the power to direct entry of a judgment n. o. v. as well as certain other issues. The United States Supreme Court held in regard to the constitutionality of judgments n. o. v. as follows:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n. o. v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n. o. v. See *Baltimore & Carolina Line, Inc. v. Redman, supra*. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n. o. v. on appeal." *Neely,* supra, at 38 U.S. 317, 322.

Obviously, if there is no constitutional bar to an Appellate Court granting judgment n. o. v., then certainly there is no violations of any constitutional rights by the District Court's action in entering a judgment n. o. v. The attempts by petitioner in this case to fabricate a constitutional issue from what is essentially a weight of the evidence issue is understandable, but certainly not of general public or constitutional importance to warrant the granting of a writ of certiorari.

CONCLUSION

For the reasons stated above, this Court should not grant certiorari.

Respectfully submitted,

HAROLD C. MOAN

JAMES E. BRAZEAU

MOAN AND RAKER
Attorneys for Respondent
219 Bell Building
Toledo, Ohio 43624
(419) 241-5263